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MURKY WATERS: COURTS SHOULD HOLD THAT THE “ANY-PROGRESS-IS-SUFFICIENT-PROGRESS” APPROACH TO TMDL DEVELOPMENT UNDER SECTION 303(d) OF THE CLEAN WATER ACT IS ARBITRARY AND CAPRICIOUS

Kelly Seaburg

Abstract: Congress enacted the 1972 Amendments to the Clean Water Act (CWA) to combat water pollution stemming from both discrete and diffuse sources. Section 303(d) of the CWA reduces both types of pollution by requiring each state to promulgate “total maximum daily loads” (TMDLs) of pollutants for all waters that are unable to meet water quality standards. A TMDL is the maximum amount of a pollutant that can be discharged from all combined sources into a given body of water if that water is going to comply with water quality standards. Although section 303(d) required states to promulgate TMDLs by 1979, they universally ignored the mandates of section 303(d) for decades. However, in recent years, lawsuits initiated by environmental organizations seeking to enforce section 303(d) have spurred TMDL development. Courts adjudicating these lawsuits have adopted different approaches when reviewing a decision of the Environmental Protection Agency (EPA) to approve state submissions of TMDLs, and these approaches have fallen into two groups. One set of courts has adopted what one commentator has dubbed the “any-progress-is-sufficient-progress” approach to TMDL development and has upheld EPA approval as long as a state has promulgated “some TMDLs” and has set deadlines for TMDL development. In contrast, a second set of courts has adopted a more holistic approach to reviewing EPA approval to effectuate Congress’s intent. This set of courts considers factors such as a state’s actual rate of TMDL development and history of noncompliance with section 303(d) as relevant to its determination and has declined to uphold the EPA’s approval of only “some TMDLs” when a state needs many TMDLs to achieve water quality standards. This Comment argues that courts should decline to adopt the “any-progress-is-sufficient-progress” approach to TMDL development and should adopt the approach of the second set of courts to effectuate the text, legislative intent, and proper function of section 303(d) of the CWA.

By 1972, Congress believed that water pollution in the United States was so severe that it amended the Water Quality Act of 1965¹ in an attempt “to restore . . . the chemical, physical and biological integrity of the Nation’s waters.”² The 1972 Amendments, known as the Clean

1. Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act) §§ 101–607, 33 U.S.C. §§ 1251–1387 (2000).

2. *Id.* § 101(a). The earlier versions of the Clean Water Act were considered a failure by Congress, courts, and commentators. See *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1042 (D.C. Cir. 1978) (“The earliest version of the Federal Water Pollution Control Act was passed in 1948 and amended five times before 1972 At the end of that [twenty-four year] period, Congress realized . . . that its water pollution efforts until then had failed”).

Water Act (CWA), substantially improved water quality.³ The CWA dramatically reduced water pollution originating from discrete and identifiable sources, called point sources.⁴ Despite such improvements, most waters in the United States do not meet water quality standards.⁵ Water quality standards specify each body of water's "designated uses" and "water quality criteria," taking into account its "use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes . . ."⁶ The 1972 Amendments failed to diminish pollution from non-point sources, such as run-off from agriculture, forestry, and housing subdivisions,⁷ and this pollution remains the leading cause of states' water quality problems.⁸

Congress designed section 303(d) to combat both point and non-point sources of pollution by providing a mechanism for regulating water discharges according to their impact on the receiving body of water.⁹ States must identify those bodies of water that would remain polluted after point sources of pollution have been regulated under the CWA¹⁰ and then determine the "total maximum daily loads" (TMDLs)¹¹ of

3. See OLIVER A. HOUCK, *THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY, AND IMPLEMENTATION* 3 (2d ed., Environmental Law Institute 2002) (1999) ("[T]he unavoidable fact is that the [1972 Amendments] . . . generated widespread compliance.").

4. See *id.* A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container . . . from which pollutants are or may be discharged." Clean Water Act § 502(14). Congress designed the CWA to diminish water pollution stemming from both point and non-point sources, which "are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the water through a confined, discrete conveyance." *Trs. for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984).

5. See Houck, *supra* note 3, at 4. The CWA requires states to establish water quality standards for all waters within their boundaries. See Clean Water Act § 303(a).

6. Clean Water Act § 303(c)(2)(A).

7. See Houck, *supra* note 3, at 4. Congress did not define the term "non-point source" in the CWA, but courts have defined it as any non-discrete source of pollution, such as runoff from agriculture, forestry, and construction activity. See *Trs.*, 749 F.2d at 558.

8. See *What is Nonpoint Source (NPS) Pollution? Questions and Answers* (1994), <http://www.epa.gov/OWOW/NPS/qa.html> (last visited April 16, 2007).

9. See *Development and Implementation of the TMDL*, <http://www.epa.gov/owow/tmdl/decisions/dec3.html> (last visited April 16, 2007).

10. See Clean Water Act § 303(d)(1)(A) ("Each State shall identify those waters within its boundaries for which the effluent limitations required . . . are not stringent enough to implement any water quality standard applicable to such waters.").

11. See *id.* § 303(d)(1)(C) ("Each State shall establish for the [impaired] waters identified in paragraph (1)(A) . . . the total maximum daily load, for those pollutants . . . at a level necessary to implement the applicable water quality standards.").

pollutants that may be present in each body of water while still meeting applicable water quality standards.¹² Once states have established TMDLs for a given body of water, the loads of pollutants are allocated among the various discharge sources through discharge permits and state water quality plans.¹³ If a state fails to establish sufficient TMDLs, the CWA requires the Environmental Protection Agency (EPA) to promulgate TMDLs for the state.¹⁴ Once states have implemented TMDLs, the TMDLs can help improve the water quality of states' impaired waters.¹⁵

Although states can use TMDLs promulgated under section 303(d) to help combat both non-point source pollution and point source pollution,¹⁶ the states and the EPA have ignored section 303(d) for decades.¹⁷ The CWA originally required compliance with section 303(d) in 1979, but neither the states nor the EPA took steps to promulgate

12. See *Idaho Sportsmen's Coal. v. Browner*, 951 F. Supp. 962, 965 (W.D. Wash. 1996) ("TMDLs are the greatest amount of a pollutant the water body can receive daily without violating a state's water quality standard. The TMDL calculations help ensure that the cumulative impacts of multiple point source discharges are accounted for, and are evaluated in conjunction with pollution from other nonpoint sources.").

13. See Houck, *supra* note 3, at 5. Completed TMDLs must be incorporated into control measures such as the technology-based permits that authorize pollutant discharges. See *Idaho Sportsmen's Coal.*, 951 F. Supp. at 965 ("[Once TMDLs are established], [s]tates are then required to take whatever additional cleanup actions are necessary, which can include further controls on both point and nonpoint pollution sources.").

14. See Clean Water Act § 303(d)(2) ("If the [EPA] disapproves such . . . load, [the EPA] shall . . . establish such loads for such waters as [the EPA] determines necessary to implement the water quality standards . . .").

15. See *infra*, Part I.C.

16. For example, section 303(d) requires the states to promulgate TMDLs that account for all pollution present in a given body of water, including both point and non-point source pollution. See *Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005) ("[T]he EPA lacks the authority to control non-point source discharges through a permitting process; instead, Congress requires states to develop water quality standards [and TMDLs] for intrastate waters."); see also *Pronsolino v. Nastro*, 291 F.3d 1123, 1139, 1141 (9th Cir. 2002) (holding that the mandates of section 303(d) are applicable to bodies of water impaired only by non-point sources). In contrast to section 303(d), the provisions of the CWA that specifically address non-point source pollution do not mandate action by the states. For example, section 319 "encourages," but does not require, states to accelerate their efforts to combat non-point source pollution with the promise of federal grants. Section 319 only requires that the states prepare assessment reports and management plans. See *Appendix A—Relationship to Other Guidance*, <http://www.epa.gov/owow/tmdl/decisions/decapa.html> (last visited June 12, 2007). Similarly, section 208 only provides for federal grants to encourage the states to develop "areawide waste treatment management plans" that include a process for controlling non-point source pollution "to the extent feasible." See Clean Water Act § 208.

17. See Houck, *supra* note 3, at 5–6.

TMDLs.¹⁸ Only a series of federal court cases initiated by environmental groups in the late 1980s and early 1990s have stimulated any action under section 303(d).¹⁹ Lawsuits across the country have shared the common goal of compelling the states and the EPA to comply with the mandates of section 303(d),²⁰ but the outcome of the litigation has varied.²¹

Courts faced with the task of resolving these disputes have adopted different approaches to reviewing EPA approval of a state's submission of TMDLs, and these approaches have fallen into two groups.²² One set of courts has affirmed EPA approval of a state's submission of TMDLs as long as the state has developed some TMDLs and has set a timeline for TMDL development in the future, even if the state needs hundreds of TMDLs before it will achieve water quality standards.²³ These courts have refused to consider a state's actual rate of TMDL development and history of noncompliance with section 303(d) when reviewing the EPA's approval.²⁴ A prominent TMDL scholar has dubbed this the "any-

18. See Houck, *supra* note 3, at 5. Several courts have acknowledged that the EPA's enforcement of section 303(d) has historically been negligent at best. See *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1353–54 (N.D. Cal. 2000), *aff'd sub nom. Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002); *Natural Res. Def. Council, Inc. v. Fox*, 93 F. Supp. 2d 531, 539 (S.D.N.Y. 2000).

19. See Houck, *supra* note 3, at 5.

20. See *id.*

21. *Compare, e.g., Idaho Sportsmen's Coal. v. Browner*, 951 F. Supp. 962, 966–67 (W.D. Wash. 1996) (holding that the EPA's approval of Idaho's submission of TMDLs was arbitrary and capricious because in seventeen years, "Idaho has completed only three TMDLs.") with *San Francisco Baykeeper Inc. v. Browner*, 147 F. Supp. 2d 991, 1000–02 (N.D. Cal. 2001) (upholding the EPA's approval of California's forty-six TMDLs despite the fact that California needed hundreds to achieve water quality standards because California had set "optimistic" deadlines for TMDL development in the future).

22. See Houck, *supra* note 3, at 190 (observing that while litigation has "continued to push the TMDL agenda forward" in more than twenty states, "an increasing number of courts are beginning to show a weariness in overseeing the process and are accepting an any-progress-is-sufficient-progress attitude toward [TMDL development] . . . [C]ourts in California, Maryland, and Oklahoma have recently held that the submission of something, anything, sufficed, and that it sufficed under the APA's 'arbitrary or capricious' standard as well.").

23. See, e.g., *Sierra Club v. EPA*, 162 F. Supp. 2d 406, 417, 419 (D. Md. 2001) (stating that the EPA's approval of Maryland's submission of approximately thirty TMDLs was not arbitrary and capricious); *San Francisco Baykeeper, Inc.*, 147 F. Supp. 2d at 1001–02 (stating that the EPA's approval of California's forty-six TMDLs was not arbitrary and capricious); *Sierra Club v. Browner*, 843 F. Supp. 1304, 1314 (D. Minn. 1993) (stating that the EPA's approval of Minnesota's forty-three TMDLs was not arbitrary and capricious).

24. See, e.g., *San Francisco Baykeeper, Inc.*, 147 F. Supp. 2d at 1000 ("[T]his court must examine the *present* state of the record regarding California's and the EPA's compliance with the CWA."); see also *id.* at 1001 ("[P]ast noncompliance is irrelevant to the question of . . . present compliance. . . .") (quoting *Natural Res. Def. Council v. Fox*, 93 F. Supp. 2d 531, 536 (S.D.N.Y.

progress-is-sufficient-progress” approach to TMDL development,²⁵ and has noted that the District Court of Maryland’s opinion in *Sierra Club v. EPA*²⁶ exemplifies this approach.²⁷

In contrast, a second set of courts has adopted a more holistic approach to reviewing the EPA’s approval of a state’s submission of TMDLs. The explicit goal of this approach is to effectuate Congress’s intent under the CWA. These courts have considered several factors relevant to their determination, including a state’s actual rate of TMDL development and history of noncompliance with section 303(d).²⁸ In conducting their analyses, these courts have noted that the explicit deadlines in the text of the CWA and the implementing regulations demonstrate that Congress intended the states to develop TMDLs quickly.²⁹ As a result, these courts have held that the EPA’s approval is arbitrary and capricious if a state has developed few TMDLs when many were required to achieve water quality standards,³⁰ and if rapid promulgation of TMDLs in the future is unlikely absent assistance from the EPA.³¹ The District Court of Montana opinion in *Friends of the Wild Swan, Inc. v. EPA*³² exemplifies this approach.

2000)) (emphasis in original).

25. See Houck, *supra* note 3, at 190.

26. 162 F. Supp. 2d 406 (D. Md. 2001).

27. See Houck, *supra* note 3, at 190, 237 n.256.

28. See, e.g., *Sierra Club v. Hankinson*, 939 F. Supp. 865, 868, 871 (N.D. Ga. 1996) (emphasizing the fact that Georgia had submitted only two TMDLs “[i]n over sixteen years since Georgia’s first TMDL submissions were due,” despite the fact that Georgia had at least 340 impaired waters).

29. See, e.g., *Idaho Sportsmen’s Coal. v. Browner*, 951 F. Supp. 962, 967 (W.D. Wash. 1996) (“Congress prescribed early deadlines for the TMDL process [that] . . . at most can mean months and a few years, not decades. Nothing could justify a schedule so slow as to defeat the CWA’s goals . . .”).

30. See, e.g., *Friends of the Wild Swan, Inc. v. EPA*, 130 F. Supp. 2d 1184, 1190, 1195–96 (D. Mont. 1999) (stating that the EPA’s approval of Montana’s submission of 130 TMDLs when Montana had approximately 900 impaired waters was arbitrary and capricious); *Hankinson*, 939 F. Supp. at 871–72 (stating that EPA’s approval of Georgia’s submission of two TMDLs when Georgia had approximately 340 impaired waters was arbitrary and capricious); *Idaho Sportsmen’s Coal.*, 951 F. Supp. at 967 (EPA’s approval of Idaho’s submission of three TMDLs when Idaho had approximately 962 impaired waters was arbitrary and capricious).

31. See, e.g., *Idaho Sportsmen’s Coal.*, 951 F. Supp. at 966–68 (holding that EPA approval of Idaho’s submission of three TMDLs in seventeen years when Idaho had approximately 962 impaired waters was arbitrary and capricious and that intervention from the EPA was required because, at the state’s current rate, TMDL development “would extend over a quarter-century, [but] would not assure ‘all necessary’ TMDL development unless hundreds of [impaired waters] were to fall off the list.”).

32. 130 F. Supp. 2d 1184 (D. Mont. 1999).

This Comment argues that courts reviewing the EPA's approval of a state's submission of TMDLs should not adopt the "any-progress-is-sufficient-progress" approach to TMDL development, even if they have adopted this approach in the past. Part I of this Comment explains the mandatory requirements imposed by the CWA on the states and the EPA for TMDL development. Part II examines how the text, legislative intent, and function of section 303(d) require timely compliance by the states and the EPA. Part III describes two approaches adopted by district courts to review EPA approval of a state's TMDLs. Part IV argues that courts should decline to adopt the "any-progress-is-sufficient-progress" approach to TMDL development because it is arbitrary and capricious. Instead, courts should approach reviewing EPA approval of a state's TMDLs in a manner that seeks to effectuate the text, legislative intent, and proper function of section 303(d) in the CWA.

I. THE CWA IMPOSES MANDATORY REQUIREMENTS ON THE STATES AND THE EPA FOR TMDL DEVELOPMENT

Section 303(d) of the CWA requires the states to promulgate TMDLs for all impaired waters within their boundaries.³³ Each state must submit its list of impaired waters and TMDLs to the EPA biennially for approval.³⁴ If the EPA rejects the state's submission, the EPA must promulgate TMDLs for the state.³⁵ Once the states have or the EPA has promulgated TMDLs, the states should incorporate those TMDLs into their water pollution control measures to achieve water quality standards.³⁶

A. *Under Section 303(d) of the Clean Water Act, States Must Develop TMDLs for All Impaired Waters in the State*

The CWA describes a series of tasks that the states must complete before promulgating TMDLs. First, each state must develop water quality standards for all waters within its boundaries.³⁷ Water quality standards establish the desired condition of a given body of water,³⁸

33. See Clean Water Act § 303(d)(1)(A), (d)(1)(C), 33 U.S.C. § 1313(d)(1)(A), (d)(1)(C) (2000).

34. See 40 C.F.R. § 130.7(d)(1) (2006).

35. See Clean Water Act § 303(d)(2).

36. See *Idaho Sportsmen's Coal.*, 951 F. Supp. at 965.

37. See Clean Water Act § 303(a)(3)(A).

38. See *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

taking into account primary uses such as “use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes”³⁹

Second, each state must identify all waters within its boundaries that are unable to meet applicable water quality standards even after the implementation of effluent limitations.⁴⁰ Effluent limitations are technological controls promulgated by the EPA to limit the amount of pollutants discharged from point sources.⁴¹ After evaluating all “existing and readily available water quality-related data and information,”⁴² each state must compile a list of the “impaired waters”⁴³ identified.⁴⁴ This list includes a priority ranking that reflects the severity of pollution and designated use of each body of water.⁴⁵

After a state has compiled its list of impaired waters, section 303(d) requires it to establish the TMDL of all pollutants preventing or expected to prevent attainment of water quality standards for those waters.⁴⁶ A TMDL defines the specified maximum amount of a pollutant that can be discharged or loaded into a given body of water from all combined sources, including point and non-point sources, while still complying with applicable water quality standards.⁴⁷ States must establish TMDLs “at levels necessary to attain and maintain the

39. Clean Water Act § 303(c)(2)(A).

40. *See id.* § 303(d)(1)(A); *see also id.* § 502(11) (“The term ‘effluent limitation’ means any restriction established by a State or the [EPA] on quantities, rates, and concentrations of [pollutants] which are discharged from point sources into navigable waters”).

41. *See Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (2002); *see also* Clean Water Act § 301(e) (“Effluent limitations established pursuant to this section . . . shall be applied to all point sources of discharge of pollutants . . .”).

42. 40 C.F.R. § 130.7(b)(5) (2006).

43. The federal regulations use the term “water quality limited segments” to describe these impaired waters. *See* 40 C.F.R. § 130.2(j) (2006).

44. The number of impaired waters included on a state’s section 303(d) list can vary depending upon the number of water bodies located within the state, the severity of water pollution in the state, and the state’s commitment to pollution control under section 303(d). For example, in 2004 Alabama reported only 179 impaired waters, whereas Washington reported 1714. *See 2004 Section 303(d) List Fact Sheet for Alabama* (2004), http://iaspub.epa.gov/waters/state_rept.control?p_state=AL; *2004 Section 303(d) List Fact Sheet for Washington* (2004), http://iaspub.epa.gov/waters/state_rept.control?p_state=WA (last visited April 19, 2007).

45. *See* 40 C.F.R. § 130.7(b)(4) (2006).

46. *See id.* § 130.7(c)(1)(ii) (2006).

47. *See* Clean Water Act § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C) (2000); 40 C.F.R. § 130.2(i) (2006).

applicable [water quality standards] with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.”⁴⁸ Scientific uncertainty thus does not halt the process of TMDL development.⁴⁹

B. The EPA Must Approve a State’s List of Impaired Waters and TMDLs, or Reject and Promulgate a List for the State

The EPA has two mandatory duties upon receipt of a state’s submission. First, the EPA must review the state’s submission and either approve or reject it within thirty days.⁵⁰ The EPA’s decision whether to approve or reject a state’s submission is largely discretionary because the substance of the EPA’s decision is not mandated by the terms of the statute.⁵¹ Rather, the CWA simply requires that the EPA make a decision.⁵² Although not mandated by the CWA, each EPA Regional Office should also negotiate with each state to develop a schedule for TMDL development.⁵³ The EPA lacks discretion to disregard the mandates of the CWA or its own implementing regulations at any point during the review process.⁵⁴

Barring judicial determination that the EPA’s approval was arbitrary and capricious as provided in the Administrative Procedure Act (APA),⁵⁵

48. 40 C.F.R. § 130.7(c)(1) (2006).

49. See Clean Water Act § 303(d)(1)(C). See also *Idaho Sportsmen’s Coal. v. Browner*, 951 F. Supp. 962, 966 (W.D. Wash. 1996) (“Although [rapid deadlines may cause] initially established TMDLs [to] be based on less than ideal data, that fact was considered and addressed by Congress . . . Congress says ignorance is no excuse for inaction. Just add a margin of safety to compensate for the lack of knowledge and keep moving.”) (internal citations omitted).

50. See Clean Water Act § 303(d)(2); 40 C.F.R. § 130.7(d)(2) (2006)

51. See *Am. Canoe Ass’n v. EPA*, 30 F. Supp. 2d 908, 918–19 (E.D. Va. 1998). As a result, the EPA’s decision is not reviewable under the citizen suit provision of the Clean Water Act, which only permits a challenge of “any act or duty under this chapter which is not discretionary” with the EPA. See Clean Water Act § 505(a)(2).

52. *Id.*

53. See *Chapter 1 - Introduction and Executive Summary*, <http://www.epa.gov/owow/tmdl/decisions/dec1.html> (last visited June 12, 2007). The EPA has acknowledged that “[if a] State chooses not to develop the needed TMDLs for appropriate pollutants on a timely basis . . . EPA has a role under the Act to develop the TMDLs . . .” *Chapter 4 - EPA and State Responsibilities*, <http://www.epa.gov/owow/tmdl/decisions/dec4.html> (last visited June 12, 2007). However, the EPA’s website implies that states may find it advantageous to adopt “long-range schedules” for TMDL development. *Id.*

54. See *Am. Canoe Ass’n*, 30 F. Supp. 2d at 919.

55. The APA governs the standard of review applicable to the EPA’s actions under section

EPA approval of a state's list fulfills the Agency's obligations under section 303(d). However, if the EPA rejects a state's submission, the EPA's second mandatory duty is triggered. The EPA must identify the state's impaired waters and develop corresponding TMDLs within thirty days of disapproval.⁵⁶

C. The States Should Implement Completed TMDLs into Existing Water Pollution Control Measures

Once a state or the EPA has established a TMDL for a given body of water, the state should incorporate that TMDL into its existing water pollution control measures.⁵⁷ Because TMDLs are pollutant calculations, they are not self-effectuating mechanisms for combating water pollution. In order for TMDLs to assist the states in achieving their water quality standards, TMDLs must be incorporated into the other water pollution control measures mandated by the CWA.⁵⁸

The implementation of completed TMDLs is the responsibility of the states. However, beyond the threat of losing federal funding, the CWA does not otherwise require implementation.⁵⁹ As the Ninth Circuit observed in *Pronsolino v. Nastri*,⁶⁰ the CWA does not mandate the implementation of TMDLs, but rather permits the states to choose “both *if* and *how*” it will implement completed TMDLs.⁶¹ The states must implement TMDLs “only to the extent that they seek to avoid losing federal grant money; there is no pertinent statutory provision otherwise requiring implementation of § 303 plans”⁶² States must not only promulgate TMDLs under section 303(d) but also implement them before TMDLs can aid states in their efforts to achieve water quality standards.

To implement TMDLs, states incorporate the pollutant calculations into the CWA's existing control measures for combating both point and

303(d). See *infra* Part III.A.

56. See Clean Water Act § 303(d)(2).

57. See Chapter 2 - *The Water Quality-Based Approach to Pollution Control*, <http://www.epa.gov/owow/tmdl/decisions/dec2.html> (last visited June 12, 2007).

58. See Chapter 3 - *Development and Implementation of the TMDL*, <http://www.epa.gov/owow/tmdl/decisions/dec3.html> (last visited June 12, 2007).

59. See *Pronsolino v. Nastri*, 291 F.3d 1123, 1140 (9th Cir. 2002).

60. 291 F.3d 1123 (9th Cir. 2002).

61. *Id.* at 1140.

62. *Id.*; see Clean Water Act §§ 309, 505, 33 U.S.C. §§ 1319, 1365 (2000).

non-point source pollution.⁶³ Generally, states incorporate TMDLs into the National Pollutant Discharge Elimination System (NPDES) permitting process to eliminate residual point source pollution by incorporating the loadings for specific point sources into the corresponding NPDES permits.⁶⁴ Similarly, states incorporate TMDLs into the state management programs developed under section 319 to target non-point source pollution. These programs vary from state to state.⁶⁵ However, states that fail to develop TMDLs cannot take advantage of these additional controls, and impaired waters within the state will not benefit from improved water quality.

In sum, section 303(d) requires each state to promulgate TMDLs for all impaired waters. After a state submits a list of impaired waters and TMDLs, the EPA must approve or disapprove the submission within thirty days. If the EPA disapproves the submission, the EPA must identify the state's impaired waters and promulgate TMDLs within thirty days. Once states have promulgated TMDLs, the states should incorporate those TMDLs into NPDES permits and the state's management programs for non-point source pollution to improve water quality.

II. SECTION 303(D) REQUIRES RAPID COMPLIANCE BY THE STATES AND THE EPA

Section 303(d) contains explicit deadlines for compliance by the states and the EPA⁶⁶ because Congress intended the states to promulgate TMDLs as quickly as possible to help states achieve water quality standards.⁶⁷ The function of section 303(d) within the CWA's regulatory scheme is to combat non-point sources of pollution while providing "back up" to the provisions that regulate point source pollution.⁶⁸ To serve this function, states should have promulgated TMDLs concurrently with the EPA's promulgation of effluent limitations.⁶⁹

63. See *Chapter 3 - Development and Implementation of the TMDL*, <http://www.epa.gov/owow/tmdl/decisions/dec3.html> (last visited June 12, 2007).

64. See *Chapter 3 - Development and Implementation of the TMDL*, <http://www.epa.gov/owow/tmdl/decisions/dec3.html> (last visited May 10, 2007).

65. See *id.*

66. See *infra* Part II.A.

67. See *infra* Part II.B.

68. See *infra* Part II.C.

69. See *infra* Part II.C.

A. *The Text of Section 303(d) and the Federal Regulations Promulgated Pursuant to the CWA Contain Explicit Deadlines*

The CWA and implementing regulations contain deadlines that require rapid action by the states and the EPA under section 303(d).⁷⁰ For example, under section 304, the EPA must identify all pollutants suitable for TMDL calculations within one year of the enactment of the 1972 Amendments.⁷¹ Under section 303, the states must submit their initial list of impaired waters and TMDLs within 180 days after the EPA identified those pollutants.⁷² However, the EPA did not identify the necessary pollutants until December 28, 1978.⁷³ As a result, the deadline for the states' initial submissions was June 26, 1979.⁷⁴

Because the 1979 deadline had passed long ago, the EPA promulgated new TMDL submission deadlines in 1992.⁷⁵ After states submit their initial lists of impaired waters and TMDLs to the EPA for approval, section 303(d) requires them to submit revised lists "from time to time."⁷⁶ The federal regulations require each state to submit revised lists by April 1st of every even-numbered year.⁷⁷

The deadline in section 303(d) that applies to the EPA requires the EPA to approve or disapprove a state's submission within thirty days, but this deadline is not triggered until a state has submitted a list for approval.⁷⁸ Section 303(d) did not contemplate total state inaction.⁷⁹ As a result of the states' inaction, the trigger lay dormant, and the states and the EPA were able to ignore section 303(d) for decades.⁸⁰

70. See Clean Water Act § 303, 33 U.S.C. § 1313 (2000); 40 C.F.R. 130.7 (1997).

71. See *id.* § 304(a)(2).

72. See *id.* § 303(d)(2).

73. See Total Maximum Daily Loads Under Clean Water Act, 43 Fed. Reg. 60,662, 60,665 (December 28, 1978) (identifying "all pollutants" as suitable for TMDL calculations).

74. See Clean Water Act § 304(a)(2)(D).

75. See *Chapter 1 - Introduction and Executive Summary*, <http://www.epa.gov/owow/tmdl/decisions/dec1.html> (last visited April 17, 2007).

76. Clean Water Act § 303(d)(2).

77. See 40 C.F.R. § 130.7(d)(1) (2006).

78. See Clean Water Act § 303(d)(2).

79. The EPA could not challenge total inaction by the states under section 303(d) because a state must have submitted something to the EPA in order for the EPA to "disapprove" the submission. See Houck, *supra* note 3, at 49–51 ("If the states submitted something unacceptably minimal, EPA could correct the problem with its own lists and TMDLs. But if the states submitted nothing at all, there was this unfortunate disconnect: there was nothing the Agency could do.")

80. See *id.* at 34, 49–51.

Courts eventually developed the constructive submission doctrine to remedy this problem.⁸¹ Courts deem a state's complete failure to identify impaired waters or promulgate TMDLs a "constructive submission" of "no TMDL," triggering the EPA's mandatory duty to approve or disapprove the submission.⁸² This doctrine does not apply if a state has submitted any TMDLs to the EPA,⁸³ "even if the submissions are obviously inadequate."⁸⁴

B. Congress Intended for the States to Develop TMDLs Rapidly

The goals of the 1972 Amendments reflect a sense of urgency. The first and second national goals were to eliminate "the discharge of pollutants into the navigable waters . . . by 1985,"⁸⁵ and to achieve "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water . . . by July 1, 1983."⁸⁶ As one member of the House Conference Committee declared: "[Congress] must act now . . . [n]either our Nation's waters, nor the patience of our people, will permit us to delay."⁸⁷ Regarding the rapid timetable for TMDL development, another House Conference member explained that TMDLs were "needed for planning and enforcement," and Congress's expectation was that "the States and [the EPA] will be diligent and will make these studies in a timely fashion."⁸⁸

81. *See id.* at 52.

82. *See Scott v. City of Hammond*, 741 F.2d 992, 996–97 (7th Cir. 1984).

83. *See, e.g., Idaho Sportsmen's Coal. v. Browner*, 951 F. Supp. 962, 967–68 (W.D. Wash. 1996) (holding that the constructive submission doctrine was not implicated where the EPA had approved Idaho's submission of three TMDLs).

84. *Friends of the Wild Swan v. EPA*, 130 F. Supp. 2d 1184, 1191 (D. Mont. 1999); *see Idaho Sportsmen's Coal.*, 951 F. Supp. at 968.

85. Clean Water Act § 101(a)(1), 33 U.S.C. § 1251(a)(1) (2000).

86. *Id.* § 101(a)(2).

87. 118 CONG. REC. 33,747, 33,753 (1972) (statement of Rep. Blatnik); HOUSE CONSIDERATION OF THE REPORT OF THE CONFERENCE COMMITTEE, OCTOBER 4, 1972, LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 241 (1973).

88. *Id.* at 246 (statement of Rep. Harsha). *But see* JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW & POLICY 144 (2003) ("Congress . . . encouraged [the] neglect [of section 303(d)]. According to Senator Edmund Muskie, who was the principal Senate sponsor of the 1972 CWA, EPA should assign 'secondary importance' to the water quality standards Congress wanted EPA to focus on the provisions of the CWA that appeared to have the greatest chance of success – the technology-based effluent limitations").

To achieve its goals as quickly as possible, Congress employed several different approaches to regulating water pollution to target both point and non-point sources. Effluent limitations,⁸⁹ a technology-based permit process, control point source pollution by setting quantitative limits on the amount of pollutants that each point source may release.⁹⁰ In contrast, section 319 of the CWA utilizes federal grants to encourage states to develop local strategies to combat non-point source pollution, and requires the states to prepare non-point source assessment reports and management plans.⁹¹ In addition to these control measures, section 303(d) seeks to combat both point and non-point source pollution through an ambient-based approach, which requires states to work backwards from the effect of water pollution to the cause. Specifically, the states or EPA calculate TMDLs by comparing all the pollution present in a given body of water with applicable water quality standards.⁹²

Congress intended the EPA and the states to implement both effluent limitations and section 303(d) as quickly as possible to eliminate water pollution.⁹³ Congress actually required the states to promulgate TMDLs under section 303(d) more rapidly than the EPA was required to implement effluent limitations.⁹⁴ For example, the EPA was required to implement most effluent limitations by July 1, 1977.⁹⁵ However, the CWA ultimately provided that “in no case” were the effluent limitations to be established later than March 31, 1989.⁹⁶ In contrast, the EPA was required to identify the pollutants suitable for TMDL calculations by

89. See Clean Water Act § 301(b), (e).

90. The permit system is called the National Pollutant Discharge Elimination System (“NPDES”). See *id.* § 402.

91. See *id.* § 319.

92. See 40 C.F.R. § 130.7(c)(1)(ii) (2006) (“TMDLs shall be established for all pollutants [in a body of water] preventing or expecting to prevent attainment of water quality standards . . .”).

93. See Houck, *supra* note 3, at 22–23 (“The House committee report described § 303(d) with care . . . [Congress acknowledged] the need for implementation, through plans that include . . . schedules of compliance at least as stringent as any required to meet any applicable water quality standard, including the total maximum daily load for pollutants in accordance with section 303(d).”) (internal citations omitted).

94. Compare Clean Water Act § 301(b)(1)(A) (“[T]here shall be achieved . . . not later than July 1, 1977, effluent limitations for point sources . . . which shall require the application of the best practicable control technology . . .”) with *id.* § 303(d)(2) (“Each State shall submit . . . not later than one hundred and eighty days after the date of publication of the first identification of pollutants [due in 1973] the [total maximum daily] loads established . . .”).

95. See *id.* § 301(b)(1)(A), (b)(2)(A).

96. See *id.* § 301(b).

October 18, 1973,⁹⁷ with the states' initial submissions of impaired waters and TMDLs due only 180 days later.⁹⁸ As a result, had the EPA met the CWA's deadline for identification of pollutants, the states would have been required to submit their first section 303(d) lists for approval as early as April 1974.⁹⁹

C. *The Function of Section 303(d) in the CWA Indicates that the States Should Have Established TMDLs Concurrently with Effluent Limitations*

The function of section 303(d) within the CWA's regulatory scheme indicates that Congress intended the states to promulgate TMDLs while the EPA was promulgating effluent limitations. Specifically, the central function of section 303(d) is to provide critical back-up to the CWA provisions that regulate point source pollution, while also aiding state programs in their efforts to combat non-point source pollution.¹⁰⁰ TMDLs increase the efficiency of effluent limitations by "[cleaning] up waters which remain[ed] substandard after the application of technology-based limits."¹⁰¹ As the House Committee on Public Works Report asserted, although the promulgation of TMDLs can be a "time-consuming and difficult task . . . if effluent limitations . . . are to provide a water quality equal to or exceeding water quality standards such [TMDLs] must be available for correlation."¹⁰² Section 303(d) requires each state to identify those waters "for which the effluent limitations . . . are not stringent enough to implement any water quality standard applicable to such waters,"¹⁰³ and to establish TMDLs accordingly.¹⁰⁴ Because the function of section 303(d) is to serve as an interface between the EPA's effluent limitations and state efforts to regulate non-point source pollution,¹⁰⁵ states should have implemented

97. *See id.* § 304(a)(2).

98. *See id.* § 303(d)(2).

99. *Id.*

100. *See Idaho Sportsmen's Coal. v. Browner*, 951 F. Supp. 962, 965 (W.D. Wash. 1996) ("The TMDL calculations help ensure that the cumulative impacts of multiple point source discharges are accounted for, and are evaluated in conjunction with pollution from other nonpoint sources.")

101. Houck, *supra* note 3, at 22.

102. *See* H.R. REP. NO. 92-911, at 106, *reprinted in* LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 793 (1973).

103. Clean Water Act § 303(d)(1)(A).

104. *See id.* § 303(d)(1)(C).

105. *See Friends of the Wild Swan, Inc. v. EPA*, 130 F. Supp. 2d 1184, 1188 (D. Mont. 1999).

TMDLs as rapidly as the EPA promulgated effluent limitations for TMDLs to serve their intended purpose.¹⁰⁶

In sum, the CWA contains deadlines for compliance with section 303(d) because Congress intended the states to promulgate TMDLs rapidly. The function of section 303(d) is to provide back-up to effluent limitations, while also aiding state efforts to combat non-point source pollution. Congress intended the states to establish TMDLs concurrently with the EPA's development of effluent limitations so that TMDLs could serve their intended purpose of helping states achieve water quality standards as quickly as possible.

III. COURTS HAVE ADOPTED DIFFERENT APPROACHES TO REVIEWING EPA APPROVAL OF A STATE'S TMDLS.

Courts have adopted two different approaches to reviewing EPA approval of a state's TMDLs.¹⁰⁷ One set of courts has held that EPA approval of a state's TMDLs is not arbitrary and capricious so long as a state has promulgated at least *some* TMDLs and has established a schedule for TMDL development.¹⁰⁸ In making this determination, these courts have refused to consider a state's actual rate of TMDL development and history of noncompliance with section 303(d).¹⁰⁹ The U.S. District Court of Maryland's opinion in *Sierra Club v. EPA*¹¹⁰ exemplifies this "any-progress-is-sufficient-progress" approach. In contrast, a second set of courts has adopted a more holistic approach to

106. See *Idaho Sportsmen's Coal. v. Browner*, 951 F. Supp. 962, 967 (W.D. Wash. 1996) ("The role of TMDLs in the CWA strategy for improving water quality confirms that they were to be developed quickly [T]o serve their intended purpose, they must be available early in the development of a state's program.")

107. See Houck, *supra* note 3, at 190.

108. See, e.g., *San Francisco Baykeeper, Inc. v. Browner*, 147 F. Supp. 2d 991, 1001–04 (N.D. Cal. 2001) (holding that EPA approval of California's forty-six TMDLs was not arbitrary and capricious); see also *Sierra Club v. Browner*, 843 F. Supp. 1304, 1313–14 (D. Minn. 1993) (holding that EPA approval of Minnesota's forty-three TMDLs was not arbitrary and capricious). According to the EPA's website, California reported 686 impaired waters in 2002. See *2002 Section 303(d) List Fact Sheet for California*, http://iaspub.epa.gov/waters/state_rept.control?p_state=CA (last visited July 21, 2007). In 1993, Minnesota had approximately 1116 impaired waters. See *Browner*, 843 F. Supp. at 1308.

109. See, e.g., *San Francisco Baykeeper, Inc.*, 147 F. Supp. 2d at 1000 ("[T]his court must examine the *present* state of the record regarding California's and the EPA's compliance with the CWA."); see also *id.* at 1001 ("[P]ast noncompliance is irrelevant to the question of . . . present compliance. . . .") (quoting *Natural Res. Def. Council v. Fox*, 93 F. Supp. 2d 531, 536 (S.D.N.Y. 2000)) (emphasis in original).

110. 162 F. Supp. 2d 406 (D. Md. 2001).

reviewing EPA approval of a state's TMDLs and has considered factors such as a state's actual rate of TMDL development and history of noncompliance with section 303(d).¹¹¹ These courts have held that EPA approval was arbitrary and capricious if the state submitted a limited number of TMDLs when the state needed many to achieve water quality standards, and when rapid promulgation of TMDLs in the future was unlikely absent assistance from the EPA.¹¹² The District Court of Montana's opinion in *Friends of the Wild Swan v. EPA*¹¹³ exemplifies this approach.

A. Courts Review the EPA's Approval of a State's TMDL Under the Arbitrary and Capricious Standard

Citizen groups can sue the EPA to enforce section 303(d) of the CWA under the APA.¹¹⁴ Judicial review of an agency action under the APA is governed by several widely-recognized principles. The APA does not give a court the authority to substitute its judgment for that of the agency.¹¹⁵ However, courts must ascertain whether the agency considered the relevant factors and whether the agency made a clear error in judgment.¹¹⁶ Though the EPA may exercise some discretion when deciding whether to approve or disapprove a state's submission,¹¹⁷ the EPA may not disregard the provisions of the CWA or the EPA's own regulations.¹¹⁸

111. See, e.g., *Sierra Club v. Hankinson*, 939 F. Supp. 865, 871 (N.D. Ga. 1996) (emphasizing the fact that Georgia had submitted only two TMDLs "[in the] over sixteen years since Georgia's first TMDL submissions were due . . .").

112. See, e.g., *Hankinson*, 939 F. Supp. at 871-72 (holding that EPA approval of Georgia's submission of two TMDLs was arbitrary and capricious, despite the state's goals for rapid TMDL development in the future, because at its current pace it would take Georgia more than 100 years to complete the TMDLs for the 340 impaired waters identified); *Idaho Sportsmen's Coal. v. Browner*, 951 F. Supp. 962, 966-67 (W.D. Wash. 1996) (holding that EPA approval of Idaho's submission of three TMDL was arbitrary and capricious because the state's proposed schedule for TMDL development would extend the deadline for another twenty-five years).

113. 130 F. Supp. 2d 1184, 1195-96 (D. Mont. 1999).

114. See 5 U.S.C. §§ 704, 706 (2000).

115. See *Nance v. EPA*, 645 F.2d 701, 705 (9th Cir. 1981).

116. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

117. See *Am. Canoe Ass'n v. EPA*, 30 F. Supp. 2d 908, 918 (E.D. Va. 1998).

118. See *Executive Bus. Media, Inc. v. U.S. Dep't of Def.*, 3 F.3d 759, 762 (4th Cir. 1993) ("In general, even where action is committed to absolute agency discretion by law, courts have assumed the power to review allegations that an agency . . . failed to follow its own regulations.") (quoting *Garcia v. Neagle*, 660 F.2d 983, 988 (4th Cir. 1981)). See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (announcing the doctrine that rules promulgated by a federal

A reviewing court may reverse an agency's decision if it concludes the decision was arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with applicable law.¹¹⁹ An agency decision is "arbitrary and capricious" within the meaning of the APA if:

[T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.¹²⁰

Although the actions of administrative agencies are "entitled to a presumption of regularity," agency action is not shielded from a "thorough, probing, in-depth review."¹²¹ Generally, if an "agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [a court] must undo its action."¹²² Plaintiffs who wish to sue to compel compliance with the TMDL program may do so under the APA by asserting that the EPA's approval of an inadequate state submission was arbitrary and capricious.¹²³

B. Several Courts Have Held That If a State Has Promulgated "Some TMDLs," and Set Deadlines for TMDL Development, the EPA's Approval Is Not Arbitrary and Capricious

When reviewing EPA approval of a state's TMDLs, several district courts have adopted an "any-progress-is-sufficient-progress"¹²⁴ approach to TMDL development. These courts refuse to consider a state's history of non-compliance with section 303(d)¹²⁵ or its slow rate of TMDL development.¹²⁶ Rather, as long as the state has developed "some

agency are controlling upon the agency).

119. See 5 U.S.C. § 706(2)(A) (2000) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .").

120. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

121. *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 415.

122. *Petroleum Commc'ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

123. See 5 U.S.C. § 706(2)(A) (2000).

124. See *Houck*, *supra* note 3, at 190.

125. See, e.g., *Natural Res. Def. Council, Inc. v. Fox*, 93 F. Supp. 2d 531, 536 (S.D.N.Y. 2000) ("EPA's past noncompliance is irrelevant to the question of agency's *present* compliance . . .").

126. See, e.g., *Sierra Club v. Browner*, 843 F. Supp. 1304, 1314 (D. Minn. 1993) (although the plaintiffs challenging the EPA's approval of Minnesota's forty-three TMDLs failed to sue under the

TMDLs” and set deadlines for TMDL development in the future, these courts have held that the EPA’s approval is not arbitrary and capricious.¹²⁷

The approach of the U.S. District Court of Maryland exemplifies this “any-progress-is-sufficient-progress” approach¹²⁸ to TMDL development. In *Sierra Club v. EPA*,¹²⁹ several environmental organizations challenged EPA approval of Maryland’s 1996 and 1998 submissions of impaired waters and TMDLs.¹³⁰ Although Maryland’s initial submission was due in 1979,¹³¹ the state did not make any submissions under section 303(d) until November 1992.¹³² By September 1999, Maryland had submitted TMDLs for only three waters.¹³³ Between September 1999 and the lawsuit’s initiation, Maryland had submitted only twenty-nine additional TMDLs.¹³⁴ While the court’s opinion did not indicate exactly how many TMDLs would be required for Maryland to achieve water quality standards,¹³⁵ it acknowledged in a subsequent case that at Maryland’s current rate of development, the requisite number of TMDLs would not be established

APA, the court’s opinion indicated that the EPA would have prevailed under the arbitrary and capricious standard. “Minnesota and the EPA may not be implementing TMDLs as quickly as plaintiffs would like, [but] the Act does not set deadlines for the development of a certain number of TMDLs . . . [The Act] instead requires the development of TMDLs in accordance with the priority ranking of the WQLS list.” (internal citations omitted).

127. *See, e.g., San Francisco Baykeeper, Inc. v. Browner*, 147 F. Supp. 2d 991, 1002 (N.D. Cal. 2001) (holding that the EPA’s approval was not arbitrary and capricious because California and the EPA “have both been doing *something* about TMDLs, albeit not as rapidly as contemplated by the passage of the CWA . . .”) (emphasis added); *Fox*, 93 F. Supp. 2d at 540 (holding that the EPA’s approval was not arbitrary and capricious because “while New York has not promulgated TMDLs for every water body on its most recent § 303(d) list, it has unquestionably formulated and submitted *some* TMDLs, and has . . . demonstrated its good-faith interest in collaborating with EPA to bring the State’s TMDL program to completion.”).

128. *See Houck, supra* note 3, at 190.

129. *Sierra Club v. EPA*, 162 F. Supp. 2d 406 (D. Md. 2001).

130. *Id.* at 413.

131. *Id.* at 412.

132. *Id.*

133. *Id.* at 417.

134. *Id.*

135. An estimate of the requisite TMDLs may not have been provided in the opinion because it was contested by the parties. For example, the plaintiffs were challenging Maryland’s omission of numerous water bodies from its most recent list of impaired waters. *See Sierra Club*, 162 F. Supp. 2d at 413. However, according to the EPA’s website, by 2004, Maryland had listed at least 473 impaired waters requiring TMDLs. *See National Section 303(d) List Fact Sheet*, http://oaspub.epa.gov/waters/national_rept.control (last visited April 18, 2007).

until at least 2038.¹³⁶ Each of Maryland's submissions to the EPA was also several months late.¹³⁷ Despite Maryland's slow rate of TMDL development and failure to comply with the firm deadlines in the EPA regulations, the EPA approved each submission.¹³⁸

The *Sierra Club* plaintiffs argued that in light of Maryland's slow rate of TMDL development¹³⁹ and history of non-compliance with section 303(d),¹⁴⁰ the EPA's approval was arbitrary and capricious.¹⁴¹ However, the court held that the state's rate of TMDL development¹⁴² and history of non-compliance with section 303(d) were both irrelevant to the question of the state's present compliance.¹⁴³ Because Maryland had made several TMDL submissions,¹⁴⁴ the court held that the constructive submission doctrine did not impose a mandatory duty upon the EPA to promulgate TMDLs for the state.¹⁴⁵ In addition, the court found that Maryland's efforts to comply with section 303(d) were sufficient to uphold EPA approval under the arbitrary and capricious standard.¹⁴⁶ In reaching its decision, the court emphasized the fact that Maryland had entered into a private agreement with the EPA that set the ambitious goal of developing TMDLs for most of the state's impaired waters by 2008 or

136. See *Potomac Riverkeeper, Inc. v. EPA*, No. 04-3885, 2006 WL 890755, at *14 (D. Md. March 31, 2006) (Maryland's "proposed TMDL completion date is projected to arrive in 2038."). *Potomac Riverkeeper Inc.* involved substantially the same facts and issues as *Sierra Club*, and the opinion quoted *Sierra Club* at length and with approval. See *id.* at *2.

137. Maryland's submissions, though due on April 1 of every even-numbered year, were made on December 23, 1994, November 13, 1996, and August 7, 1998. *Sierra Club*, 162 F. Supp. 2d at 412.

138. *Id.*

139. For example, according to the EPA's website, Maryland promulgated only ten approved TMDLs in 2000, twenty-six in 2002, nineteen in 2004, and thirty-two in 2006. See *2004 Section 303(d) List Fact Sheet for Maryland* (2004), http://oaspub.epa.gov/waters/state_rept.control?p_state=MD#APRTMDLS (last visited April 19, 2007).

140. *Sierra Club*, 162 F. Supp. 2d at 412.

141. *Id.* at 418.

142. See *id.* at 419 ("[T]he Act does not set deadlines for the development of a certain number of TMDLs.") (quoting *Sierra Club v. Browner*, 843 F. Supp. 1304, 1314 (D. Minn. 1993)). The court also stated that a fast-paced schedule for TMDL development, such as five years, would be undesirable. *Id.*

143. See *id.* at 418 ("[P]ast compliance [with Section 303(d)] is irrelevant to the question of an agency's present compliance.") (quoting *Natural Res. Def. Council, Inc. v. Fox*, 93 F. Supp. 2d 531, 536 (S.D.N.Y. 2000)).

144. *Id.* at 418, n.18.

145. *Id.*

146. *Id.* at 419.

2011,¹⁴⁷ despite the state's actual rate of TMDL development. Furthermore, because the EPA provided what the court called a "detailed basis for EPA's decision" in a letter, the court concluded that the EPA's approval should be upheld under the APA.¹⁴⁸ When the status of Maryland's TMDL program was challenged again in subsequent litigation in 2006, the District Court held tightly to its position in *Sierra Club*.¹⁴⁹

C. *Several Other Courts Have Held That the EPA's Approval of "Some TMDLs" When Many are Required for a State to Achieve Water Quality Standards is Arbitrary and Capricious*

Several courts have adopted a holistic approach to reviewing EPA approval of a state's TMDLs to effectuate Congress's intent under the CWA. These courts have considered factors such as a state's actual rate of TMDL development and history of noncompliance with section 303(d) as relevant to their decision whether to uphold EPA approval. Because the deadlines in the text of the CWA indicate that Congress intended TMDLs to be developed as quickly as possible, these courts have reasoned that a state with a slow rate of TMDL development is prolonging its history of noncompliance with section 303(d).¹⁵⁰ If a state has promulgated only some TMDLs when many are required to achieve water quality standards, and if it seems unlikely that the state will promulgate TMDLs rapidly in the future without the assistance of the EPA, these courts have declined to uphold the EPA's approval.¹⁵¹

147. *Id.* at 419. The court asserted that if Maryland did not comply with the deadlines in the state's agreement with the EPA, citizens could sue for enforcement. *Id.* at 417, n.15. However, in a subsequent case involving essentially the same facts, the court revoked this assertion, calling it "dicta." See *Potomac Riverkeeper v. EPA*, No. 04-3885, 2006 WL 890755, at *8 (D. Md. March 31, 2006).

148. *Sierra Club*, 162 F. Supp. 2d at 417-18.

149. See *Potomac Riverkeeper, Inc.*, 2006 WL 890755, at *14.

150. See, e.g., *Idaho Sportsmen's Coal. v. Browner*, 951 F. Supp. 962, 965 (W.D. Wash. 1996) (noting that the "tight deadlines" for TMDL development in the text of the CWA indicate that states should develop TMDLs quickly to comply with the CWA's mandates) (quoting *Natural Res. Def. Council, Inc. v. Fox*, 909 F. Supp. 153, 157-58 (S.D.N.Y. 1995)).

151. See, e.g., *Friends of the Wild Swan, Inc. v. EPA*, 130 F. Supp. 2d 1184, 1195-96 (D. Mont. 1999) (holding that the EPA's approval of Montana's submission of 130 TMDLs when Montana had approximately 900 impaired waters was arbitrary and capricious); *Sierra Club v. Hankinson*, 939 F. Supp. 865, 871-72 (N.D. Ga. 1996) (holding that the EPA's approval of Georgia's submission of two TMDLs when Georgia had approximately 340 impaired waters was arbitrary and capricious); *Idaho Sportsmen's Coal.*, 951 F. Supp. at 967 (holding that the EPA's approval of Idaho's submission of three TMDLs when Idaho had approximately 962 impaired waters was

The reasoning of the U.S. District Court of Montana in *Friends of the Wild Swan, Inc. v. EPA*¹⁵² exemplifies this approach.¹⁵³ The U.S. District Court of Montana reviewed the EPA's approval of Montana's 1998 submission of only 130 TMDLs for the state's approximately 900 "impaired waters."¹⁵⁴ Because it was undisputed that the state would need to promulgate an additional 3000 TMDLs to meet water quality standards,¹⁵⁵ the plaintiffs argued that EPA approval was arbitrary and capricious.¹⁵⁶

In reaching its decision that the EPA's approval was arbitrary and capricious, the court relied on the explicit deadlines in the text of section 303(d).¹⁵⁷ The court stated that the CWA's "tight deadline for submission of TMDLs emphasizes an obvious congressional mandate that TMDLs be established in a matter of years, not decades."¹⁵⁸ The court also noted in passing that "[b]ecause TMDLs provide a basis for developing pollution control measures where technology-based point source controls prove inadequate, TMDLs must be developed quickly if they are to serve their intended purpose."¹⁵⁹

The court also considered the state's rate of TMDL development and history of noncompliance with section 303(d) as relevant to its determination.¹⁶⁰ Montana's first TMDL submission was not until 1996, when the state submitted one TMDL.¹⁶¹ The plaintiffs initiated their lawsuit to compel compliance with section 303(d) in February of 1997,¹⁶² and in that same year, Montana submitted 129 additional TMDLs to the EPA for approval.¹⁶³ However, the court declined to uphold the EPA's approval of Montana's submission because the state would need over one hundred years at its current pace to develop the

arbitrary and capricious).

152. See *Friends of the Wild Swan, Inc. v. EPA*, 130 F. Supp. 2d 1184 (D. Mont. 1999).

153. See *id.* at 1195–96.

154. See *id.* at 1195.

155. *Id.*

156. *Id.*

157. See *id.* at 1195–96.

158. *Id.* at 1196.

159. *Id.*

160. See *id.*

161. *Id.*

162. See *id.* at 1191.

163. *Id.* at 1190, n.7.

3000 TMDLs required for the impaired waters identified in 1998.¹⁶⁴ The court concluded that affirming would “put off for another generation a mandate that Congress required be taken years ago.”¹⁶⁵ Although Montana had recently set a goal of establishing the required TMDLs by 2007 and had even enacted a state law to give that goal force and effect, the court observed that “Montana’s past performance in TMDL development does not make it optimistic that the state can satisfy its own statutory mandate absent help from the EPA.”¹⁶⁶ Thus, the court held that the EPA’s approval of Montana’s 1998 submission violated the APA’s arbitrary and capricious standard.¹⁶⁷

In sum, courts across the country have adopted different approaches when reviewing EPA approval of a state’s TMDLs. Several courts have adopted an “any-progress-is-sufficient-progress” approach and have held that as long as a state has promulgated “some TMDLs” and has set deadlines for TMDL development in the future, the EPA’s approval is not arbitrary and capricious. In contrast, several other courts have considered factors such as the state’s actual rate of TMDL development and history of noncompliance with section 303(d) in making their determination. These courts have held that if a state has promulgated a limited number of TMDLs and many are required to achieve water quality standards, and if rapid promulgation of TMDLs in the future is unlikely without assistance from the EPA, the EPA’s approval is arbitrary and capricious.

IV. THE “ANY-PROGRESS-IS-SUFFICIENT” APPROACH TO THE DEVELOPMENT OF TMDLS IS INCONSISTENT WITH THE TEXT, INTENT, AND FUNCTION OF SECTION 303(d)

The text, legislative intent, and function of section 303(d) in the CWA indicate that Congress intended states to establish TMDLs as quickly as possible for all impaired waters to achieve the CWA’s goals.¹⁶⁸ Courts

164. *Id.* at 1196.

165. *Id.*

166. *Id.* at 1196, n.9.

167. *Id.* at 1196. In its opinion, the court also separately considered the plaintiffs’ claims that the EPA’s approval of 129 point source TMDLs promulgated by Montana between 1986 and 1996 in connection with the state’s issuance of point source discharge permits was arbitrary and capricious under the APA because the impaired waters were low on the state’s priority list. However, the court determined that EPA approval of these point source TMDLs was not arbitrary and capricious because they were promulgated in accordance with the federal regulations. *See id.* at 1195.

168. *See supra* Parts II.A–C.

reviewing the EPA's approval of a state's TMDLs should adopt the more holistic approach of courts such as the District Court of Montana in *Friends of the Wild Swan* and should consider factors such as a state's actual rate of TMDL development and history of noncompliance with section 303(d) in making their determination. Because a state that has made minimal efforts toward developing the requisite number of TMDLs to achieve water quality standards in a timely manner has failed to comply with the mandates of section 303(d) and the implementing regulations,¹⁶⁹ courts should find EPA approval of that state's TMDLs arbitrary and capricious. Such a finding would trigger the EPA's obligation to intervene and help the state achieve water quality standards.

A. When Reviewing the EPA's Approval of a State's TMDLs, Courts Should Not Adopt the "Any-Progress-Is-Sufficient-Progress" Approach

Courts should not adopt an "any-progress-is-sufficient-progress"¹⁷⁰ approach to TMDL development, and courts that have adopted this approach in the past should reject it because such an approach is inconsistent with the text, legislative intent, and function of section 303(d). Section 303(d) requires each state to promulgate TMDLs for all impaired waters within its boundaries as quickly as possible to achieve water quality standards.¹⁷¹ A court that upholds EPA approval of a state submission that fails to comply with the mandates of section 303(d) or the implementing regulations is permitting the state to prolong its history of noncompliance.

Judicial review of EPA approval is essential to ensure that the EPA is properly enforcing the CWA's mandate that the states promulgate TMDLs rapidly. A slow rate of TMDL development permits the states to have it both ways—they avoid complying with section 303(d) while also escaping the CWA's consequences for non-compliance.¹⁷² Specifically,

169. See *supra* Part III.B.

170. See Houck, *supra* note 3, at 190.

171. See *supra* Part II.B.

172. See *Friends of the Wild Swan, Inc. v. EPA*, 130 F. Supp. 2d 1199, 1202 (D. Mont. 2000), *amended*, 130 F. Supp. 2d 1204 (D. Mont. 2000), *stay denied*, 130 F. Supp. 2d 1207 (D. Mont. 2000) *aff'd in part, rev'd in part*, 74 F. App'x 718 (9th Cir. 2003) ("[A slow rate of TMDL development would] create an escape hatch in the heart of the Act whereby both the State and the federal agency could frustrate Congressional imperatives simply by refraining from action.")

states with a slow rate of TMDL development can escape application of the constructive submission doctrine. By promulgating some TMDLs, though many are required to achieve water quality standards, states have avoided making a constructive submission of no TMDLs, which would trigger the EPA's duty to intervene.¹⁷³ Therefore, while states must promulgate TMDLs for all impaired waters within its boundaries,¹⁷⁴ the EPA has permitted many states to develop TMDLs at a glacial pace and thus avoid compliance with section 303(d).

When reviewing the EPA's approval of a state's submission under the APA, courts should not adopt the "any-progress-is-sufficient-progress" approach of courts like the District Court of Maryland in *Sierra Club*.¹⁷⁵ Rather, courts should subject the EPA's actions to a "thorough, probing, in-depth review"¹⁷⁶ to ensure that the EPA has actually considered all "the relevant factors" and refrained from making a "clear error of judgment."¹⁷⁷ In *Sierra Club*, plaintiffs challenged EPA approval of Maryland's submissions because, at Maryland's rate of TMDL development, the requisite TMDLs to achieve water quality standards would not be established until at least 2038.¹⁷⁸ However, the court upheld the EPA's approval under the APA because the EPA had written a letter providing what the court called "a detailed basis for EPA's decision."¹⁷⁹ Apparently accepting the EPA's decision at face value, the court did not analyze the reasons provided by the EPA, or discuss whether the EPA's letter demonstrated that it had considered all "the relevant factors" and had clearly not made an "error of judgment."¹⁸⁰ The court also failed to consider whether the EPA's approval was consistent with Congress's intent under section 303(d). Instead, the court stated that Maryland's slow rate of TMDL development and history of noncompliance with section 303(d) were irrelevant to its determination,¹⁸¹ and that because Maryland had submitted several TMDLs, and set a goal of developing most of the

173. See *Scott v. City of Hammond*, 741 F.2d 992, 996–97 (7th Cir. 1984).

174. See Clean Water Act § 303(d)(1)(A), 33 U.S.C. § 1313(d)(1)(A) (2000).

175. *Sierra Club v. EPA*, 162 F. Supp. 2d 406, 418–19 (D. Md. 2001).

176. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

177. *Id.* at 416.

178. See *Potomac Riverkeeper, Inc. v. EPA*, No. 04-3885, 2006 WL 890755, at *9, *14 (D. Md. March 31, 2006) (discussing the court's previous holding in *Sierra Club* with approval).

179. See *Sierra Club*, 162 F. Supp. 2d at 417–18.

180. See *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 416.

181. See *Sierra Club*, 162 F.Supp.2d at 418.

requisite TMDLs by 2008 or 2011,¹⁸² the EPA's approval was not arbitrary and capricious.

The “any-progress-is-sufficient-progress” approach is inconsistent with the text, congressional intent, and function of section 303(d) in the CWA because a state with a glacial rate of TMDL development has failed to comply with the mandates of section 303(d).¹⁸³ Although it is difficult to draw generalizations about the ideal length of time for TMDL development by any given state, it is not difficult to discern that rapid action by the states, and not mere promises to act in the future, are required by the text of the CWA and implementing regulations.¹⁸⁴ The text of the CWA and implementing regulations contain explicit deadlines for the states to promulgate TMDLs.¹⁸⁵ Even scientific uncertainty is no excuse for delaying the process of TMDL development.¹⁸⁶ Furthermore, a state that promulgates only some TMDLs when many are required prevents TMDLs from adequately serving their function of helping states achieve water quality standards.¹⁸⁷ The longer courts acquiesce in the EPA permitting states to prolong their noncompliance with section 303(d), the longer states will frustrate the mandates of the CWA.

B. The Holistic Approach of District Courts, as Seen in Friends of the Wild Swan, is Consistent with the Text, Legislative Intent, and Function of Section 303(d) in the Clean Water Act

Other district courts¹⁸⁸ have properly recognized that a state must have taken more than minimal steps toward promulgating the requisite

182. *Id.* at 418–19.

183. Section 303(d) requires the EPA to review each state's submission of TMDLs and not merely the state's “goals” for the future. *See* Clean Water Act § 303(d)(2), 33 U.S.C. § 1313(d)(2) (2000).

184. *See, e.g., id.* § 303(d)(1)(C) (“Each State shall establish for the [impaired] waters . . . the total maximum daily load . . . to implement the applicable water quality standards . . .”); 40 C.F.R. 130.7(c)(1)(ii) (2006) (“TMDLs *shall* be established for all pollutants preventing or expected to prevent attainment of water quality standards . . .”) (emphasis added).

185. *See* Clean Water Act § 303(d)(2); 40 C.F.R. §130.7(d)(1).

186. *See also* Idaho Sportsmen's Coal. v. Browner, 951 F. Supp. 962, 966 (W.D. Wash. 1996) (“Although [rapid deadlines may cause] initially established TMDLs [to] be based on less than ideal data, that fact was considered and addressed by Congress . . . Congress says ignorance is no excuse for inaction. Just add a margin of safety to compensate for the lack of knowledge and keep moving.”) (internal citations omitted).

187. *See supra* Part II.C.

188. *See, e.g.,* Friends of the Wild Swan, Inc. v. EPA, 130 F. Supp. 2d 1184 (D. Mont. 1999).

number of TMDLs to achieve water quality standards to have complied with the mandates of section 303(d). While the deadlines in the text of the CWA regarding the states' initial submissions of TMDLs have passed, these deadlines indicate that Congress intended the states to establish TMDLs at a very rapid rate.¹⁸⁹ For example, the CWA required the states to submit lists of TMDLs to the EPA only 180 days after the EPA identified those pollutants suitable for TMDL calculations.¹⁹⁰ Congress intended the EPA to begin making the required identifications immediately, as indicated by the CWA's requirement that the identifications be completed within one year of the 1972 Amendments' enactment.¹⁹¹

Even more significantly, the implementing regulations promulgated in 1992 contain deadlines for submissions of lists containing impaired waters and TMDLs that apply to the states in full force and effect.¹⁹² States must submit their lists of impaired waters and TMDLs to the EPA for approval by April 1st of every even-numbered year.¹⁹³ With such clear requirements in place for the rapid and continuous development of TMDLs by the states until water quality standards are achieved, courts should not uphold the EPA's approval of submissions that entirely fail to meet the regulations' deadlines.

Congress enacted the 1972 Amendments to help states meet their water quality standards within a decade.¹⁹⁴ Specifically, Congress sought to establish water quality that would allow for "the protection and propagation of fish, shellfish, [wildlife, and recreation] . . . by July 1, 1983."¹⁹⁵ To achieve this goal, the 1972 Amendments set forth an aggressive scheme that combats both point and non-point sources of pollution.¹⁹⁶ Because the states have not yet achieved water quality standards, despite the fact that decades have passed since the 1972 Amendments' enactment, states should act in accordance with Congressional intent by promulgating TMDLs as quickly as possible to help eliminate both point and non-point source pollution.¹⁹⁷

189. *See supra* Part II.A.

190. *See* Clean Water Act § 303(d)(2).

191. *See id.* § 304(a)(2).

192. *See Chapter 1 - Introduction and Executive Summary, supra* note 75.

193. *See* 40 C.F.R. § 130.7(d)(1).

194. *See* Clean Water Act § 101(a)(2).

195. *Id.*

196. *See supra* Part II.B.

197. *See* Houck, *supra* note 3, at 4-5.

Although courts that have refused to uphold EPA approval of only “some TMDLs” when many are required have primarily relied upon the text of the CWA to support their determinations,¹⁹⁸ the function of section 303(d) within the CWA also reveals that Congress intended that the states establish TMDLs as quickly as possible.¹⁹⁹ TMDLs promulgated pursuant to section 303(d) provide back-up for the CWA’s effluent limitations by cleaning up residual point source pollution following the implementation of technological controls, as well as helping the states combat non-point source pollution.²⁰⁰ Section 301 required the EPA to implement effluent limitations by July 1, 1977, or in certain circumstances, by July 1, 1989.²⁰¹ Because section 303(d) requires each state to “identify those waters within its boundaries for which the effluent limitations . . . are not stringent enough to implement . . . water quality standard[s]” and to promulgate TMDLs accordingly,²⁰² sections 301 and 303(d) were designed to complement each other. Congress required the states to promulgate TMDLs as quickly as possible for TMDLs to serve their intended function.²⁰³

When reviewing the EPA’s approval of a submission of only some TMDLs when many are required for the state to achieve water quality standards, courts should adopt the holistic approach of courts like the District Court of Montana in *Friends of the Wild Swan*.²⁰⁴ When plaintiffs challenged the EPA’s approval of Montana’s submission of 130 TMDLs because at least 3000 were required,²⁰⁵ the court subjected the EPA’s actions to the “thorough, probing, in-depth review” that the U.S. Supreme Court has held is appropriate when considering whether an agency’s actions are arbitrary and capricious.²⁰⁶ The Montana court ultimately determined that the EPA’s approval was arbitrary and capricious because even when a state has set deadlines for TMDL

198. See *Sierra Club v. Hankinson*, 939 F. Supp. 865, 871–72 (N.D. Ga. 1996).

199. See *supra* Part II.C.

200. See Houck, *supra* note 3, at 22.

201. See Clean Water Act § 301(b)(1)(A)–(2)(B), 33 U.S.C. § 1311(b)(1)(A)–(2)(B) (2000).

202. *Id.* § 303(d)(1)(A).

203. See *supra* Part II.C; *Idaho Sportsmen’s Coal. v. Browner*, 951 F. Supp. 962, 967 (W.D. Wa. 1996) (“The role of TMDLs in the CWA strategy for improving water quality confirms that they were to be developed quickly To serve their intended purpose, they must be available early in the development of a state’s program.”).

204. *Friends of the Wild Swan, Inc. v. EPA*, 130 F. Supp. 2d 1184, 1195–96 (D. Mont. 1999).

205. See *id.*

206. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

development that are independent from those of the implementing regulations, courts should not uphold EPA approval if the state has a slow rate of TMDL development that suggests that the state will not rapidly establish TMDLs in the future.²⁰⁷ Given the states' history of noncompliance with section 303(d) and the CWA's "obvious congressional mandate that TMDLs be established in a matter of years, not decades,"²⁰⁸ the approach of courts like Montana is consistent with the text, intent, and proper function of section 303(d) in the CWA.

CONCLUSION

Courts should subject EPA approval of a state's submission of TMDLs to a probing review under the APA to ensure that the EPA is not allowing states to thwart Congressional mandates by adopting a glacial rate of TMDL development. Specifically, courts should adopt the holistic approach of courts like Montana in *Friends of the Wild Swan* when reviewing EPA approval of a state's submission of TMDLs in order to effectuate the text, intent, and function of section 303(d) in the CWA. Congress intended that the states establish TMDLs as quickly as possible for all impaired waters to achieve the CWA's goal of water quality. In light of the long history of noncompliance with section 303(d) by the states and the EPA, if the courts do not effectuate the mandates of the CWA, who will?

207. *Wild Swan*, 130 F. Supp. 2d at 1196, n.9.

208. *Id.* at 1196.